IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1624

JESSIE STEARNS,

Petitioner,

v.

VETERANS OF FOREIGN WARS,
A corporation chartered by
Congress of the United States,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATEMENT OF THE CASE

Respondent accepts the "Statement of the Case" by Petitioner except its opening sentence that "The Veterans of Foreign Wars (V.F.W.) is a private corporation *established* under federal law, 36 U.S.C. Sec. 111, *et seq.*" Respondent disagrees in so far as that statement would seem to imply that Sec. 36 U.S.C. 111,

passed in 1936 by Congress "established" the V.F.W. The V.F.W. had existed as a private association before it received a federal charter in 1936. See 36 U.S.C. Sec. 116 which provides:

> "Said corporation may and shall acquire all of the assets of the existing national association known as the Veterans of Foreign Wars of the United States upon discharging or satisfactorily providing for the payment discharge of all its liabilities."

REASONS FOR DENYING THE WRIT

I. The Mere Granting of a Federal Charter to a Private Corporation Does Not Invoke Due Process Guarantees.

The Respondent, the Veterans of Foreign Wars of the United States (hereafter V.F.W.) is a private corporation of veterans of the Armed Forces of the United States who have completed certain required foreign service. The purposes of the organization are "fraternal, patriotic, historical and educational." The V.F.W. had existed for several years prior to 1936 when it received a federal charter.

This Court in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856 (1961), at page 722, stated the criteria of "state involvement" and the means by which its existence or non-existence was to be determined:

> "It is clear, as it always has been since the Civil Rights Cases (US) supra, that 'Individual invasion of individual rights is not the subject matter of the amendment,' at p. 11, and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it . . . .
>
> "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."

On two occasions in this case, the United States District Judge and the United States Court of Appeals for the District of Columbia have addressed themselves to the question as to whether a federal charter alone constitutes the kind of significant state involvement in private discriminations that is violative of the equal protection guarantee in the due process clause of the Fifth Amendment. (Page 9a, Appendix A; Page 9c, Appendix C; Page 4b, Appendix B and Page 1d, Appendix D, Petition for Writ of Certiorari.) On each such occasion the answer was in the negative.

In the case of *Jackson* v. *Metropolitan Edison Co.,* 419 U.S. 345, 95 S.Ct. 449 (1974), this Court recently reaffirmed the principle that the determination of state involvement must be based on a particularized inquiry focusing on whether there is:

> ". . . a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

This Court declined to find that such a "close nexus" existed in that case where the facts disclosed that a public utility furnishing electricity had been granted a partial monopoly by the State and that it was subject to a form of extensive government regulation by the State in a way most other businesses were not.

In *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 92 S.Ct. 1965 (1965), a private fraternal club refused service to plaintiff who was a guest, solely because he was a Negro. The private club was required to secure a license from the Pennsylvania Liquor Control Board in order to serve alcoholic beverages. The regulations of the Board required the club file a list of its members and employees and keep extensive financial records. The Board had the right to inspect the premises at any time patrons, guests or members were present. The Court held at page 176-177:

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise. . . .
>
> "We therefore hold that . . . the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge so as to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment."

See also *Millenson* v. *New Hotel Monteleone, Inc.,* 475 F.2d 736 (1973), *cert. den.* 414 U.S. 1011 (1973), where the plaintiff, a woman, claimed Fourtenth Amendment violations as the result of being refused admission to a "Men's Grill" in a hotel. The Court held she was not entitled to relief because, "The impetus for the grill's admission policies originated with the hotel and not with the state," and that the state was not in any realistic sense "a partner or even a joint venturer" in the business of the hotel.

The Petitioner argues that the mere fact of federal chartering in some manner constitutes "government involvement," but the record in this case is barren of evidence demonstrating any relationship whatever between the chartering process and the internal membership policies of the V.F.W.

II. The Record Fails To Disclose a "Symbiotic Relationship" Between the Federal Government and the V.F.W. Giving Rise to Fifth Amendment Protections.

Petitioner attempts to argue there are other "significant involvements" with the Federal Government that raise Constitutional violations. The case of *Burton* v. *Wilmington Parking Authority, supra,* is instructive as to the type of relationship necessary to trigger Constitutional safeguards. In that case a private restaurant operator leased space for a restaurant from a state parking authority in a publicly-owned building supported and maintained by public funds. The restaurant operator (Eagle) practiced racial discrimination by refusing to serve Negroes. The Court concluded that:

> ". . . the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. . . .
>
> "The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment."

It is submitted that here there is nothing approaching the "symbiotic relationship" between the State and the restaurant operator in *Burton, supra.*

Reports and Audits

Petitioner points out that the V.F.W. is required to submit an annual audit (36 U.S.C. Sections 1102-1103) and to make reports of its proceedings to Congress (36 U.S.C. Section 118). As the District Court Judge pointed out in his opinion (Page 14c-15c, Appendix C, Petition for Writ of Certiorari):

> "Clearly, having granted a federal charter to an organization, Congress has an interest in seeing that such a corporation handles itself responsibly: that Congress retains power to 'repeal, alter, or amend' the Charter of the V.F.W., 36 U.S.C. Section 120, is indicative of this vested interest. Certainly, regulations requiring reports on proceedings and financial audits to be prepared and presented to Congress is one method of determining whether an organization is acting responsibly. However, such regulations do not, explicitly or impliedly, authorize, encourage, mandate, foster, or relate to the V.F.W.'s internal membership policy."

Tax Exemption

The V.F.W. is exempted from a tax on income, 26 U.S.C. Section 501(c)(4) and contributions to the V.F.W. are allowed as deductions from the gross income of contributors (26 U.S.C. Section 170(c)(3)). Petitioner alleges that the tax exemption granted such organizations as the V.F.W. "warrants the conclusion that there is congressional approval of V.F.W. activities and purposes." The facts do not support Petitioner's conclusion. The relevant inquiry of *Moose Lodge No. 107* v. *Irvis, supra,* is whether the tax exemption can be said in any way to "foster or encourage" the internal membership policies of the V.F.W. No such facts are present here.

This same issue was raised in the case of *New York City Jaycees, Inc.* v. *United States Jaycees, Inc.,* 512 F.2d 856 (1975) where the membership policy of the United States Jaycees in excluding women was challenged, and it was alleged that the tax exemption under the same provision of the Internal Revenue Code as the V.F.W. constituted a prohibited "government involvement." The Court of Appeals for the Second Circuit held at page 859:

> "Similarly the grant of tax exemptions to the Jaycees does not constitute significant government involvement in the organization's exclusionary membership policy. As the Supreme Court has pointed out in the context of a First Amendment challenge to tax exemptions granted to religious organizations, a tax exemption does not constitute government 'sponsorship' but instead 'creates only a minimal and remote involvement.' *Walz* v. *Tax Commission,* 397 U.S. 664, 675-76, 90 S.Ct. 1409, 1415, 25 L.Ed.2d 697 (1970). See also *Marker* v. *Shultz,* 158 U.S.App.D.C. 224, 485 F.2d 1003, 1005-07 (1973). No genuine nexus between the tax exemption and the complained of internal membership policies has been shown and in its absence, there is no constitutional wrong."

Prosecution of Veterans Claims

By federal statute (38 U.S.C. Section 3402(a)(1)) the administrator of the Veterans Administration is authorized to recognize certain members of the V.F.W., to assist and to represent veterans prosecuting claims against the Veterans Administration for

veteran benefits. Other veterans' organizations are accorded the same recognition. These representatives are furnished office space for this work by the government. Petitioner asserts that "This activity suggests that it performs a public function." This same argument was made in *New York City Jaycees, Inc.* v. *United States Jaycees, Inc., supra.* The Court in disposing of that issue said:

> "Plaintiff's reliance upon the so-called 'public function' doctrine whereby private persons performing certain functions traditionally reserved to the state may become subject to constitutional restrictions is also misplaced. That doctrine is a severely limited one and 'the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions.' *Evans* v. *Newton,* 382 U.S. 296, 300, 86 S.Ct. 486, 489, 15 L.Ed.2d 373 (1966). In fact this Court has expressly recognized the 'value of preserving a private sector free from the constitutional requirements applicable to government institutions.' *Wahba* v. *New York University,* 492 F.2d 96, 102 (2d Cir. 1974). The public function theory applies only to those services which are 'so clearly governmental in nature that the state cannot be permitted to escape responsibility by allowing them to be managed by a supposedly private agency.' *Powe* v. *Miles,* 407 F.2d 73, 80 (2d Cir. 1968). Furthermore, the Supreme Court in its recent decision in *Jackson* v. *Metropolitan Edison Company,* supra, has suggested that the service involved must not only be one which is traditionally the exclusive prerogative of the state but that it must in addition be one which the state itself is under an affirmative duty to provide. *Id.,* — U.S. at —, 95 S.Ct. at 454. In *Jackson,* the Court specifically declined to find state action on a public function theory despite the fact that defendant was a utility company, provided an essential public service, enjoyed a state-protected partial monopoly and was subject to extensive regulation by the state. Certainly the public function argument is far less persuasive in the situation before us here. Moreover, as has been pointed out, plaintiff's claim does not relate in any way to the public services provided by the Jaycees, but only to the internal membership policies of the organization."

The claims presented against the Veterans Administration by the V.F.W. representatives and others on behalf of veterans are for the most part adversary actions against the Federal Government. No authority is cited by Stearns that the government has a "duty" to provide assistance for those bringing claims against it. It is equally clear that this service is provided by the V.F.W. to *all veterans*—man and women—regardless of whether they are members of the V.F.W. There is therefore no evidence of discrimination in the execution of this service by the V.F.W. It is therefore difficult to envision this service as being a vehicle for establishing a "public function" issue in the present case. There is no demonstrable relationship between this service to all veterans and the membership policies of the V.F.W. There is no basis therefore for challenging those activities.

In another recent case, *Junior Chamber of Commerce of Rochester, Inc., et al.* v. *The United States Jaycees, et al.,* 495 F.2d 883 (1974) *cert. den.* 419 U.S. 1026 (1974), the by-laws of the United States Jaycees limited its membership to males. The Junior Chamber of Commerce of Rochester, in violation of those by-

laws, admitted women as members. It was therefore expelled from the United States Jaycees. The Rochester group filed suit against the national organization, claiming violations of the Fifth and Fourteenth Amendments to the Constitution of the United States and the Civil Rights Act, 42 U.S.C. Section 1983, because the by-laws of the national organization banned women from its membership. It was alleged that the United States Jaycee organization received substantial benefits under the Internal Revenue Act by way of tax exemptions, and also administered substantial funds on behalf of the United States government.

In affirming the action of the District Court in dismissing the complaint because the federal question was insubstantial, and because the plaintiffs had failed to allege any direct relationship between the discrimination against the plaintiffs and the distribution of government funds, the United States Court of Appeals held:

> "The plaintiffs would have us rule that because the Jaycees are *used* by the state government to dispense funds on its behalf that all their conduct automatically becomes state action subject to a Sec. 1983 suit regardless of whether there exists discrimination by the private entity in the dispensing of the funds. In effect, then, plaintiffs say that the state must, consistent with the Constitution, refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged state action. We disagree.
>
> ". . . The membership policy against which the attack has been leveled has no connection with the state activity of the United States Jaycees. Neither the complaint nor the record establishes or promises to establish the kind of state involvement

> essential to a civil rights action under Section 1983.
>
> ". . . We do not say that the relationship between the United States and the United States Jaycees is so remote that the actions of the Jaycees could never be attributed to the government. If, for example, the Jaycees administered the government's funds in a discriminatory manner, a remedy for constitutional violation might well obtain. In our case, however, the question is whether the United States is obligated to see to it that the United States Jaycees' conduct shall be exemplary quite apart from its administering of programs and governmental funds. No case has been cited which extends to this length. On the contrary, the criteria announced by the Supreme Court have tended to require that the alleged unconstitutional conduct relate specifically to governmental action."

CONCLUSION

This Court has recognized the clear distinction between the operation of constitutional guarantees on "private" conduct and "state" action. In *Jackson* v. *Metropolitan Edison Company, supra,* the Court stated:

> "The Due Process Clause of the Fourteenth Amendment provides 'nor shall any State deprive any person of life, liberty, or property, without due process of law.' In 1883, this Court in The Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835, affirmed the essential dichotomy set forth in that Amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory and wrongful,' against which the Fourteenth Amendment offers no shield. *Shelley* v. *Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948)."

The Veterans of Foreign Wars is a private organization composed of veterans of the Armed Forces. Like most corporations, the Veterans of Foreign Wars is given powers to enact by-laws. Its membership has enacted by-laws which limit membership to men. It is submitted that this enterprize is one which cannot be said to have been the result of "government action" nor authorized, fostered or mandated by the federal government. Having failed to establish the action of the V.F.W. as "governmental" it is unnecessary to consider the issue as to whether there is a reasonable basis to exclude women from membership in the V.F.W. It is submitted therefore that the membership policy of the Veterans of Foreign Wars as decided by its membership is beyond the pale of governmental interference.

The Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case should be denied.

Respectfully submitted,

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